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CHARLES ELMORE CROPLEY

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Nos. ~~1052-1053~~

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. DICKINSON

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. WITHROW

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments entered in this case on January 4, 1946, by the United States Circuit Court of Appeals for the Fourth Circuit.

OPINION BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 252–261) is reported in 152 F. (2d) 865.

JURISDICTION

The judgments below were entered on January 4, 1946 (R. 261–262). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Judgments were rendered for the plaintiffs in two suits brought under the Tucker Act to recover compensation for the taking of their lands caused by the raising of the water level of the Kanawha River by erection of a dam. A part of the dam was first used, in conjunction with a coffer dam, to raise the water level in October 1936. By May 1937 the dam was in operation and capable of being operated as it is today and the water level had been partially raised at plaintiff's properties. By a series of raises extending to September 22, 1938, the elevation was gradually raised until it reached the normal pool elevation of the dam. The following questions are presented:

1. Whether the plaintiffs are entitled to recover the estimated cost of uninstalled riprapping[1] and other works which would have protected their lands from erosion and damage due to saturation and softening of the soil and wave action.

2. Whether plaintiff Dickinson is entitled to compensation for a permanent flooding of land which he reclaimed before suit.

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[1] Riprapping is a sustaining wall of stones (R. 41, 43).

3. Whether an easement to overflow certain lands intermittently has been taken within the meaning of the Fifth Amendment.[2]

4. Whether the causes of action accrued prior to September 22, 1938.

STATUTES INVOLVED

The relevant provisions of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, as amended, 28 U. S. C. sec. 41 (20), and of R. S. sec. 3477, as amended, 31 U. S. C. sec. 203, are set out in the Appendix *infra*, pp. 27–29.

STATEMENT

The court below affirmed the judgments entered against the United States in two suits brought under the Tucker Act, 28 U. S. C. sec. 41 (20) (R. 1–3, 17–19). These two cases had been selected as tests to determine the legal principles to be applied in some thirty similar suits pending in the trial court (see R. 255). The relevant facts may be summarized as follows:

Both plaintiffs own property abutting the Kanawha River in South Charleston, West Virginia (R. 1, 17). By Acts of July 3, 1930, c. 847, 46 Stat. 918, 928, and August 30, 1935, c.

[2] If a compensable easement to overflow the lands intermittently has been taken, a subordinate question is whether any proper evidence sustains the award therefor. For the sake of brevity, this question will not be discussed herein but will be briefed should certiorari be granted.

831, 49 Stat. 1028, 1035, Congress authorized the improvement of the river for the purpose of providing a nine-foot navigation channel by substituting four new locks and dams for older ones. See H. Doc. No. 31, 73d Cong., 1st sess. The Winfield Lock and Dam were thereafter constructed (R. 183), being completed in 1937 (R. 40, 176).

On July 1, 1936, notice was sent to the holders of War Department permits[3] in the area that the water elevation would be raised (R. 230–231), and the Government cut shrubbery and vegetation along the river banks before the water was raised (R. 93, 105, 146–147, 154). By October 21, 1936, construction on the dam had proceeded far enough so that it was used, in conjunction with a cofferdam, to raise the elevation in a pool downstream from plaintiff's properties (R. 176). By a series of six raises between May 30, 1937 and September 22, 1938, the water was gradually raised to the elevation of 566 feet, normal pool level (R. 23, 40, 42, 176). The dam was officially accepted from the contractor on August 20, 1937 (R. 40, 176) but at least by May 30, 1937, it was capable of being operated as it is today (R. 176) and had already partially raised the water level at plaintiffs' property (R. 23).

The property of plaintiff Dickinson contained 3.1 acres before the pool level was changed. He acquired it in August 1937 and has erected a large

[3] These permits authorized the construction of structures in the affected area above the Winfield Dam (R. 230).

residence, which is not yet complete, near the top of the river bank. He has also done considerable grading and filling of the property, and has used it for commercial purposes, such as storing trucks and cranes. (R. 39, 53–56.) Withrow's land consists of residence property fronting on the river for some 180 feet (R. 42). Between his residence and garage and the river bank there is platted a street known as River Drive, which has not yet been opened and is presently used as a back lawn (R. 87–88). Withrow owns a five-foot strip connecting his residence property and the river bank at the end of River Drive. The area of the entire river bank beyond River Drive is 0.27 acre. (R. 88.)

The present actions were instituted by complaints filed by Dickinson on April 1, 1943 (R. 3) and by Withrow on April 10, 1943 (R. 19). Dickinson claimed compensation for the permanent flooding of 0.22 acre, for the intermittent flooding of 0.10 acre and for other items (R. 2). Withrow asserted a claim for the permanent flooding of 0.11 acre, for the intermittent flooding of 0.04 acre and for other damages (R. 18). After a consolidated trial, the court by letter of December 14, 1944, summarized its conclusions and stated the method of computation of its awards as to riprapping which would have protected plaintiff's lands from damage (R. 37–39). Findings of fact and conclusions of law were entered (R. 39–45), and, on February 22, 1945, judgments were en-

tered awarding Dickinson $6,538.06 and Withrow $2,094.40, both awards bearing interest from September 22, 1938 (R. 14–16, 31–33). Each judgment was composed of three items. Dickinson was awarded $400 for 0.22 acre that would have been permanently flooded if he had not filled and reclaimed it, $75 for 0.10 acre intermittently flooded, and $4,245.63 as the cost of protective work which would have prevented erosion and damage from saturation and wave action. Withrow was awarded $200 for 0.11 acre permanently flooded, $35 for 0.04 acre intermittently flooded and $1,859.40 for similar protective work. (R. 44.)

The contentions of the parties, the evidence in support thereof, and the court's rulings so far as they are material here, may be summarized as follows:

The first issue related to the time when the causes of action accrued. Plaintiffs contended that only one cause of action accrued and that the taking was not complete until September 22, 1938, when elevation of 566 feet was attained (R. 8). The Government agreed that in each case only one cause of action accrued, but contended that Dickinson could not maintain his suit because the claim had accrued in May 1937, when the dam was completed and in operation (R. 176), and prior to the time he acquired the land and, hence, had vested in his predecessor in title (R. 8, 14). The Government also objected to plaintiff's valuation of the property which was made

as of September 22, 1938, the date the water reached its new normal level (R. 8, 29), instead as of May 1937. Evidence of the facts concerning construction of the dam and the raising of the water level (*supra*, p. 4) was given. Furthermore, it appeared that Dickinson had acquired the land on August 16, 1937 (R. 52) after it had been partially flooded by raising of the water elevation. Judgments entered for both plaintiffs refer to September 22, 1938, as the date of taking (R. 16, 32). Fair market value was determined as of that date, the Government's objection thereto being overruled (R. 12, 37–38), and the cost of protective measures was also determined as of that date, but on the hypothesis that the work would have been done in 1936 under conditions as they then existed and at a time when Dickinson did not own the land (R. 41–42, 43). As to Dickinson, the court concluded that only one cause of action accrued and that Dickinson was entitled to recover compensation for the part of his land which was submerged prior to the time he acquired title as well as that submerged thereafter (R. 44).

In the case of Dickinson the evidence showed that of the 0.22 acre all except 0.05 acre had been reclaimed and will not be submerged (R. 41, 84, 201–203). Rejecting the Government's contention, the court held that the fact that this land was reclaimed did not preclude recovery therefor

(R. 44). The judgment states that upon payment of the award the United States will be vested with an easement to flood Dickinson's land lying between elevation 554.65 feet and 566 feet "as the same existed on the date of taking," namely, September 22, 1938 (R. 16). The land described by elevations in the judgment is not the same either in area or location as the land for which Dickinson claimed the Government was required to pay (see R. 54).

The next issue related to plaintiffs' claims for the cost of measures to protect against erosion. Plaintiffs asserted that during the raises and thereafter, the properties had been damaged by erosion due to saturation, softening of the soil, the flow of the river and similar causes. They did not claim the decrease in land value resulting from such erosion but rather the cost of installing riprapping, etc., which would have afforded adequate protection against erosion (R. 47, 94). The Government denied liability for such protective measures (R. 51).

No evidence as to the money amount of the damage from erosion was presented. Instead, plaintiffs introduced evidence of the cost and opinions of value of their entire property and the opinion that construction of protective measures would be sound economy (R. 54–57, 118–119, 122, 157–159, 160, 163, 166, 167–169). Evidence was also given as to the protective work of an entirely different type done by Dickinson and the

cost thereof, but some of this work was admittedly for purposes of beautification, not protection (R. 64–66, 81, 112–113). The court found that the erosion and damage "was due to saturation and softening of the soil and wave action thereon and was the direct and proximate result of the permanent flooding of" 0.22 acre in the case of Dickinson and 0.11 acre in the case of Withrow (R. 41, 43). The court estimated the cost of protection at $4,245.63 for Dickinson and $1,859.40 or Withrow, the amount being computed at a rate of $10.33 per lineal foot of river bank (R. 38, 42, 43). This estimate was based upon extending riprapping three feet in elevation above the point of permanent flooding "to allow for the effects of wave action" (R. 38). In each case the court concluded that "it would have been sound economy" to spend the stated amount "to protect the residue of plaintiff's property against erosion and damage" (R. 42, 43).

The last issue related to the awards to Dickinson and Withrow for 0.10 acre and 0.04 acre of land, respectively, located between elevations 566 and 574 and alleged to be flooded intermittently (R. 40, 42–43). The Government denied the plaintiffs' allegations that such land "has been and will continue to be subject to more frequent overflow than previous to the construction of said dam" (R. 2, 4, 18, 20). At the trial, plaintiffs' counsel stated that he did not know how often such intermittent flooding would occur (R. 70),

and offered no evidence thereon.[4] Instead, he introduced, over objection, evidence that in condemnation suits the Government had acquired flowage easements (R. 172–174). Plaintiffs' witnesses were permitted, over objection, to express an opinion of value of 0.10 acre to be flooded temporarily or intermittently (R. 71, 97, 117).

The Government introduced data showing that since the dam was put in operation the overflows between elevations 566 and 574 had been less frequent than before (R. 195–198, 199). And Government witnesses testified that the water would not be raised to elevation 574 by proper operation of the dam but only if all the operating machinery suddenly failed or similar causes occurred (R. 200). The Government moved to strike evidence as to the lands lying between elevations 566 and 574 for several reasons (R. 12, 29). However, the motions were denied and the court found that such lands "would be flooded intermittently as a result of the manipulation of certain movable parts of the Winfield Dam" (R. 40, 42). The judgments decreed that upon payment of the award as to the land between 566 feet and 574 feet, the United States would be vested with a perpetual easement "for such use (not constant flowage, however) as may result from the

[4] Pursuant to stipulation, there was attached to the pretrial orders data showing the frequency of overflows previous to the construction of the dam (R. 11, 28).

construction and operation of said Winfield Dam" (R. 16, 32).

The judgments of the district court were affirmed in all respects by the court below (R. 252–261).

SPECIFICATIONS OF ERRORS TO BE URGED

The court below erred:

1. In holding that plaintiffs could recover the cost of protective measures which if installed prior to the raising of the water level would have prevented all erosion and damage.

2. In holding that plaintiff Dickinson could recover compensation for lands which had been reclaimed by him.

3. In holding that an easement to overflow plaintiffs' land intermittently had been taken.

4. In admitting evidence as to the value of an easement to overflow intermittently plaintiffs' land, there being no showing as to frequency, duration, velocity or any other element of the alleged flooding.

5. In holding that the plaintiffs' causes of action did not accrue until September 22, 1938.

6. In affirming the judgments of the district court.

REASONS FOR GRANTING THE WRIT

While the amounts here involved seem small, the questions presented are important to the Government. These are test cases, the principles of which will control some thirty similar suits pend-

ing in the trial court (see R. 255). A large liability of the Government is concerned, for the district court awarded the claimants $10.33 per lineal foot as the cost of protection from erosion (R. 38), the pool of the Winfield Dam is some thirty miles long, and plaintiffs' properties are not substantially different from those of other landowners along the river.

Aside from the Winfield Dam, the principles enunciated in these cases will generally apply throughout the country. The problems discussed herein are not unique, but are the usual questions presented whenever streams are dammed either by the War Department for navigation or flood control purposes or by other Government agencies for various purposes such as reclamation, irrigation or water power. For example, there are now pending in the Court of Claims cases concerning Boulder Dam and other projects where the question of when the taking occurred is important.

1. It is our position that plaintiffs are not entitled to recover the estimated cost of uninstalled riprapping and other works which would have protected their lands from erosion and damage due to saturation and softening of the soil and wave action. The cost of protection is not the value of the land being taken nor of the damage to adjacent property.

In *United States* v. *Lynah*, 188 U. S. 445, 474, and again in *Manigault* v. *Springs*, 199 U. S. 473,

484, this Court approved the decision in *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.) rejecting plaintiffs' claim to recover the cost of raising levees around their rice fields to protect them against the consequences of the Government's works. More recently in *Southern Pacific Co.* v. *United States*, 266 U. S. 586, this Court affirmed *per curiam* a decision of the Court of Claims which rejected a claim to recover the cost of a bulkhead to protect plaintiffs' railroad tracks from being washed out as a result of a Government jetty. The Court of Claims had stated in *Southern Pacific Co.* v. *United States*, 58 C. Cls. 428, 431:

> It [the plaintiff] is not suing here for the value of property destroyed but for work done to protect property not yet developed. We do not think that such an expenditure can be held to be a basis upon which to fix just compensation for property appropriated by the Government.

See also *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 C. Cls. 396. The award by the court below of the cost of protective measures is, we submit, contrary to these decisions.

Clearly the cost of the riprapping does not show the value of the land being flooded, which is all to which petitioner is entitled. Nor is the Government liable for that cost on the theory that the riprapping protects land not taken against damage from saturation and wave action. It is

too well settled to permit of argument that when the Government improves the navigable capacity of a stream by shifting the current or raising the water level, damages and erosion resulting from saturation, wave action and the like are consequential and cannot be recovered from the United States.[5] The court below held this rule to be inapplicable, resting its decision on the principle that when a part of a person's land is taken, "he is entitled not only to compensation therefor but also to compensation for any damage occasioned to his remaining land" (R. 257). However, the mere fact that some property interest has been taken does not render compensable what would otherwise constitute consequential damage. In *United States* v. *Willow River Power Co.*, 324 U. S. 499, 501, nominal damage was done "to land as land or to structures as such", but that did not authorized recovery of power value. Cf.

[5] *Bedford* v. *United States*, 192 U. S. 217; *Manigault* v. *Springs*, 199 U. S. 473; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Comm'n*, 241 U. S. 351; *Sanguinetti* v. *United States*, 264 U. S. 146; *Franklin* v. *United States*, 101 F. (2d) 459 (C. C. A. 6), affirmed on another ground, 308 U. S. 516; *W. A. Ross Const. Co.* v. *Yearsley*, 103 F. (2d) 589 (C. C. A. 8), affirmed on other grounds, 309 U. S. 18; *Christman* v. *United States*, 74 F. (2d) 112 (C. C. A. 7); *Salliotte* v. *King Bridge Co.*, 122 Fed. 378 (C. C. A. 6), certiorari denied, 191 U. S. 569; *Coleman* v. *United States*, 181 Fed. 599 (N. D. Ala.); *Barr* v. *Spalding*, 46 F. 2d 798, 801 (W. D. Ky.); see also *Hollister* v. *The Union Company*, 9 Conn. 436; *Fitchburg R. Co.* v. *Boston & Maine R. Co.*, 3 Cush. 58 (Mass.); *Green* v. *Swift*, 47 Cal. 536; *Green* v. *State*, 73 Cal. 29.

High Bridge Lumber Company v. *United States*, 69 Fed. 320 (C. C. A. 6); *United States* v. *Meyer*, 113 F. (2d) 387 (C. C. A. 7), certiorari denied, 311 U. S. 706.[4] The decision in *United States* v. *Grizzard*, 219 U. S. 180, relied upon by the court below (R. 258), is not to the contrary. That case simply held that when the taking of a portion of a tract of land rendered access to the remainder less convenient, the resulting depreciation in value to the remainder was compensable.

2. The second question is whether the Government is liable for the expenses of preventing a taking. The result of the improvements made to the property by Dickinson was to reclaim all except 0.05 acre of the land which would have been permanently flooded (R. 41), so that no permanent flooding occurred. The court below recognized that its holding that nevertheless Dickinson was entitled to recover as for permanent flooding of 0.22 acre was directly contrary to the decision in *Kelley's Creek & N. W. R. Co.* v. *United States*, 100 C. Cls. 396, 412, in 1943, and it stated that it disagreed with the holding in that case. The Court of Claims had declared that while "private property may not be 'taken'

[4] See also *Danforth* v. *United States*, 308 U. S. 271, 286; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546; *Chicago, Burlington, Etc., R'd* v. *Chicago*, 166 U. S. 226; *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120; *Coleman* v. *United States*, 181 Fed. 599 (C. C. N. D. Ala.), cited in *Sanguinetti* v. *United States*, 264 U. S. 146, 150; *Campbell* v. *United States*, 266 U. S. 368.

without just compensation," the Constitution "makes no provision for repayment of expenses incurred to prevent a taking." It is important that this conflict with the Court of Claims, in which many of these cases arise, be resolved.

3. Although the Winfield Dam did not cause more frequent overflows than existed prior to its erection, the court below awarded plaintiffs damages for an easement to overflow intermittently their lands between elevations 566 and 574 feet. The only evidence concerning overflows indicates that since the dam was put in operation, intermittent overflows between elevations 566 feet and 574 feet were less frequent than before (R. 195–198, 199). There is nothing to show that the dam will cause more frequent intermittent overflows than had occurred in the past, nor was any such finding made. Plainly, liability cannot be imposed upon the Government unless it is at least shown that the frequency of overflow has been increased. Cf. *United States* v. *Sponenbarger*, 308 U. S. 256, 266. Nevertheless, the trial court awarded judgments for the alleged taking of an easement for such intermittent overflow, finding that the lands "will be flooded intermittently as a result of the manipulation of certain movable parts of the Winfield Dam" (R. 40, 42).

The court below did not deem it necessary, in order to hold the Government liable for the tak-

ing of an overflow easement, that the dam cause more intermittent overflows on plaintiffs' lands than normally occurred. This point is of importance beyond the facts of this case since the opinion below sets a precedent for allowing recovery where the Government's construction has not increased the normal overflows, landslides, floods, and the like. Moreover, the decision below on this question is in conflict with that of the Court of Claims in *Robert Y. Creech et al.*, v. *United States*, 102 C. Cls. 301, certiorari denied, 305 U. S. 870. There the Court of Claims determined that plaintiffs were not entitled to recover under the Fifth Amendment for damage caused by floods occurring after the Government had built a levee, since the same water elevations would have been normally occasioned without the levee.

The finding of the district court that the lands would be intermittently flooded as a result of manipulation of parts of the dam was based upon testimony of the Government's witness that the dam could be so manipulated. But the witness further testified that elevation above normal (*i. e.*, 574 feet) would not be reached by proper operation of the dam but only "if all the operating machinery suddenly failed and we were unable to raise the rollers clear of the water" (R. 200). In affirming, the court below stated (R. 261):

> The frequency within which the flooding will occur was not shown, but we think

that the acquisition of flowage easements in the vicinity and the construction of the dam with equipment capable of flooding the lands to the elevation of 574 feet indicate an intent to subject the land to intermittent flooding and amount to the taking of easements for which compensation was due. See *Peabody* v. *United States,* 231 U. S. 530.

The district court made no reference to intent of the Government, and seems to have taken the view that the Government's liability is measured by the maximum result that might be produced by the dam. Liability under the Tucker Act rests upon implied contract, and certainly there can be no implication of a contract by the United States to buy something it does not intend to use. Thus, in *Robert Y. Creech et al.* v. *United States,* 102 C. Cls. 301, certiorari denied, 325 U. S. 870, the question whether there had been a taking was determined, not according to the results which were physically possible, but according to the Government's plans of regulation. See also *Karlson* v. *United States,* 82 F. (2d) 330, 333–336 (C. C. A. 8); *Horstmann Co.* v. *United States,* 257 U. S. 138; *Tempel* v. *United States,* 248 U. S. 121. The circuit court of appeals erroneously based its holding upon an alleged intent of the Government to subject the land to intermittent flooding. No finding to this effect had been made and the Government's evidence was that there was no intent to operate the dam to produce such a flooding.

The only contrary indication arises from the fact that in condemnation proceedings easements for occasional overflow had been acquired. These proceedings, between other parties, cannot constitute an estoppel, and, we submit, cannot take the place of evidence establishing a taking which the plaintiffs were required to produce.

4. The court below held that the taking occurred on September 22, 1938, when the normal pool elevation of the dam was reached, rather than in May 1937 when the dam was completed and the water level had already been partially raised at plaintiff's property (R. 176, 23). If the land were taken in May 1937, plaintiff Dickinson may not recover, for he did not purchase the land until August 1937[7] and did not secure an assignment of the claim against the United States from the previous owner as required by R. S. sec. 3477 (Appendix, *infra*, p. 28) and could not do so since the claim had not been allowed.[8] And if the taking occurred prior to April 1937, both plaintiffs' causes of action were barred by the six-year limitation in the Tucker Act.

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[7] "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment." *Danforth* v. *United States*, 308 U. S. 271, 284; *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 597; *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 10; *Ferrell* v. *United States*, 49 C. Cls. 222.

[8] The recovery by Dickinson can only be sustained if it is held that no cause of action arose until after August 16, 1937 (R. 52), when he purchased the land. Cf. R. S., sec.

As to the date of taking, the decision below is contrary to *Court of Marion County, W. Va.* v. *United States,* 53 C. Cls. 120, rather than supported by it (cf. R. 255–256). The court there considered three possible views as to the date the cause of action accrued: first, when the dams were completed and put in operation; second, when the first damage was suffered; or third, some subsequent date when the taking was deemed to be complete. See 53 C. Cls. at page 145. After analyzing the subject at length, the Court of Claims took the first view. As Chief Justice Campbell stated in his concurring opinion (53 C. Cls. at p. 155):

> As suggested by Judge Downey, we may know with some certainty when a dam is built and the pool begins to fill what lands or interest therein are or will be appropriated. That date should fix the time of the taking.

The decision likewise is inconsistent with two other decisions of the Court of Claims. In *Columbia Haley Dooner* v. *United States,* 95 C.

3477, Appendix, *infra*, p. 29. At that time the dam had been put in operation, the land had been flooded in part and the water elevation had been raised vertically some 1½ feet (R. 176, 23). The fact that on August 20, 1937, the United States Corps of Engineers accepted the dam from the contractor (R. 40, 176) had no relation to the physical facts except to indicate that the contractor's work had previously been co[illegible]leted and was important only for purposes of the contract. It was, therefore, immaterial here.

Cls. 392, the dam was closed on January 16, 1933, but the water in the pool was not brought to its new elevation nor was the claimant's land completely submerged until February 2, 1938. The court held that the taking occurred on January 16, 1933, and hence interest should be awarded from that date. (See 95 C. Cls. at pp. 397, 400.) The court below overlooked the findings there when it stated (R. 256) that the Court of Claims "held that the owner of the permanently flooded lands was entitled to interest from the date when the land was completely submerged." In *Causby* v. *United States,* 60 F. Supp. 751, certiorari granted April 1, 1946, No. 630, this Term, the Court of Claims expressly found that an easement for flight of aircraft was taken on June 1, 1942, the effective date of the Government's lease of the airport, although the Government's use upon which recovery was based did not occur until sometime later (see record in No. 630, present Term, p. 22).

Moreover, we believe that the decision is, in principle, erroneous. The acts of the Government were complete when it used the dam to impound water. It thereby asserted the right to use private property as required by operation of the dam, and, hence, asserted dominion which constituted the taking.* The only reason advanced

*There could be no question of the Government's intent here since on July 1, 1936, prior to first use of the dam, notices had been sent stating the Government's intention to

by the court below for its holding was that until the pool was raised on September 22, 1938, to its permanent level "the whole matter was subject to government change and control and the taking was not complete" (R. 256). But the dam had been put into operation almost two years earlier than the date the court below decided the land was taken, and by May 30, 1937, it was capable of being operated as it is today (R. 176). The same certainty of elevation existed at that time as it did in September 1938. The likelihood of changing or abandoning the completed dam was no greater in 1937 than in 1938.[10] Thus, the reason given does not justify selection of September 1938 rather than May 1937 or earlier as the date of taking.[11]

raise the elevation of water to 566 feet, and prior to the actual raising of the water level, vegetation had been cut along the bank with the owners' consent (R. 93, 105, 146–147, 154, 230–231).

[10] The lock, which had already been completed at a cost of some $2,000,000 when the construction of the dam was commenced, would have been useless without the dam (R. 177). Moreover, Congress authorized the Kanawha River Improvement in accordance with the detailed plans set out in H. Doc. No. 31, 73rd Cong., 1st sess. (1933); Act of August 30, 1935, c. 831, 49 Stat. 1028, 1085. Hence, any substantial change would have required Congressional action.

[11] The Government, of course, agrees that commencement of construction of the project is not a taking. *United States* v. *Sponenbarger*, 308 U. S. 256; *Danforth* v. *United States*, 308 U. S. 271; *Pitt River Power Company* v. *United States*, 98 C. Cls. 253, certiorari denied, 319 U. S. 747. But here the dam was complete and in operation in May 1937.

At least by the time the dam was put in operation the owners knew that their lands would be flooded. The water was first raised in October 1936 and, thereafter, was gradually raised until the new pool level was reached in September 1938 (R. 176, 23). By his own admission plaintiff Dickinson knew the Government planned to raise the water to the elevation of 566 feet when in August 1937 he purchased the property, which had already been partially flooded (R. 72). On July 9, 1936, plaintiff Withrow received a notice from the War Department that the water level would be raised to the level of 566 feet (R. 229–230). Yet, if the holding of the court below is correct, the landowner must wait until the pool is completely filled before he brings his action, market value will be determined as of that date and interest for delay in payment will be computed only from that date. This postponement would impose a serious burden on landowners, particularly in cases where the pool is slow to fill. We know of no authority to support the conclusion of the court below that although the elevation of the water had been partially raised on plaintiff's land by May 30, 1937,[12] yet the

[12] The raises occurred as follows (R. 23): October 21, 1936, in pool area but not at plaintiffs' lands; May 30, 1937, from 554.65 to 556; October 20, 1937, from 556 to 558; January 6, 1938, from 558 to 563.15; August 26, 1938, from 563.15 to 565; September 1, 1938, from 565 to 565.5; September 22, 1938, from 565.5 to 566.

owners had, as yet, no cause of action even though they knew the Government was raising the water to 566 feet and the damages could already be adequately determined.

In *Portsmouth Co.* v. *United States,* 260 U. S. 327, this Court held that a petition alleging that the Government had installed a coastal battery with intent to fire projectiles over plaintiffs' land whenever it saw fit sufficiently alleged a taking under the Tucker Act. See *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Co.* v. *United States,* 250 U. S. 1. The court below, in holding that respondents' causes of action did not arise until September 22, 1938, stated (R. 256), "An intention ultimately to use the land is not sufficient to constitute a taking under these circumstances." However, more than a year before, the dam had already flooded part of paintiffs' lands (R. 23). And to sustain the award for the alleged taking of an easement to overflow intermittently the land between elevations 566 feet and 574 feet the court concluded "that the acquisition of flowage easements in the vicinity and the construction of the [Winfield] dam with equipment capable [by May 30, 1937 (R. 176)] of flooding the lands to the elevation of 574 feet indicate an intent to subject the land to intermittent flooding and amount to the taking of easements for which compensation was due. See *Peabody* v. *United States,* 231 U. S. 530." (R. 261). At the time of trial the Winfield dam had

not subjected the lands to any more frequent intermittent overflow than had occurred before its construction (see *supra*, p. 16). Thus, the court below has held that the principle stated by this Court in the *Peabody* and *Portsmouth* cases was applicable for the purpose of charging the United States for liability for alleged intermittent flooding but was inapplicable for the purpose of determining when the causes of action arose. We submit that no such distinction can be drawn and that the rationale of the decision below is inconsistent with the *Peabody* and *Portsmouth* cases.

This question is of general importance. The date of taking determines not only the time when a Tucker Act suit can be commenced, but also the date of valuation and the date from which interest should be computed. Moreover, since it is the owner at the time of taking who is entitled to payment (*Danforth* v. *United States*, 308 U. S. 271, 284; *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 597; *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 10; *Ferrell* v. *United States*, 49 C. Cls. 222; *Carpenter* v. *United States*, 56 F. (2d) 828 (C. C. A. 2)), the date of taking determines who is to be paid. Thus, determination of the question will have a widespread effect on all such projects and will govern the manner in which the Government's arrangements for making compensation are executed.

CONCLUSION

Since the questions presented are of general importance and since the decision below conflicts with other decisions in several respects, the petition for writs of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

APRIL 1946.

APPENDIX

The Tucker Act of March 3, 1887, c. 359, 24 Stat. 505 as amended, 28 U. S. C. sec. 41 (20) provides as follows:

> The district courts shall have original jurisdiction as follows:
>
> * * * * * *
>
> Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claimants the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the in-

ternal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent

any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

* * * * *

The material portion of R. S. sec. 3477 as amended, 31 U. S. C. sec. 203 provides:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

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